(31)

In the

Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 557

JUDSON L. THOMSON MANUFACTURING COMPANY,

PETITIONER,

v.

FEDERAL TRADE COMMISSION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HARRY LeBARON SAMPSON,
ANDREW MARSHALL,
Counsel for Petitioner.

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TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Judson L. Thomson Manufacturing Company, a corporation organized under the laws of the Commonwealth of Massachusetts, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cause on July 31, 1945 and amended on August 14, 1945, and respectfully represents:

1. By said judgment the Circuit Court of Appeals for the First Circuit dismissed a petition by the petitioner to review and set aside an order of the Federal Trade Commission, and affirmed and enforced the order of the Federal Trade Commission. The order of the Federal Trade Commission that was affirmed required the petitioner to cease

and desist from leasing its rivet-setting machines on the condition that the lessee should not use in these machines any rivets other than those acquired from the petitioner, or some source authorized by the petitioner, and from enforcing or continuing such conditions in its leases. R. p. 42.

OPINION BELOW.

2. The opinion of the Circuit Court of Appeals is printed at pages 1113–1125 of the Record, and the judgment of the Court at page 1125. The opinion below has not yet been reported.

JURISDICTION OF THIS COURT.

3. The judgment of the Circuit Court of Appeals for the First Circuit was entered on July 31, 1945, and was amended on August 14, 1945. R. 1125. The jurisdiction of this Court is under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936).

STATUTE INVOLVED.

4. The statute involved is Section 3 of the Clayton Act (38 Stat. 731; 15 U.S.C. sec. 14) which reads as follows:

> "Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other com-

modities of a competitor, or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

This case also involves the provisions of Section 11 of the Clayton Act, which require the Federal Trade Commission to make a report in writing containing its findings as to the facts. (38 Stat. 734; 15 U.S.C. sec. 21). The material part of that section is printed at the end of the brief filed with this petition.

THE QUESTIONS PRESENTED.

5. This case presents the following questions:

(1) Whether a condition in leases of machines that the lessees shall not use in the leased machines any rivets except those supplied by the lessor is a condition that the lessees shall not use or deal in rivets of competitors of the lessor, if the lessor has no monopoly in machines of the same kind through patents or otherwise and the lessees are free to lease or purchase from other readily available sources machines like those leased which will do their work equally well.

(2) Whether the order to cease and desist could properly be made by the Federal Trade Commission on a complaint which alleged that the petitioner was leasing machines with the condition, agreement or understanding that the lessees will not use the machines for setting any other rivets than those manufactured by the petitioner or sold under its authority, and did not allege that the petitioner was leasing machines on the condition, agreement or understanding that the lessee shall not use or deal in rivets of competitors of the lessor.

(3) Whether the testimony in this case was sufficient to support a finding that the effect of the petitioner's leases

might be to substantially lessen competition in interstate commerce in rivets.

(4) Whether the order of the Federal Trade Commission should be set aside because the Commission failed to make such findings of fact as are required by Section 11 of the Clayton Act.

STATEMENT OF MATTERS INVOLVED.

6. This case originated in a complaint against the petitioner brought by the Federal Trade Commission before the Commission itself which charged that the petitioner was leasing its machines on the condition that the lessees should not use the leased machines for setting any rivets other than those made by the petitioner or sold under its authority, that the effect of this practice might substantially lessen competition in interstate commerce in tubular and bifurcated rivets, and that the petitioner was thereby violating Section 3 of the Clayton Act. The complaint did not allege that the petitioner was leasing machines on the condition or agreement that the lessee would not use rivets of competitors. R. 20–22.

7. The petitioner filed an answer which admitted that it was leasing its machines on the agreement that they should not be used for setting rivets other than those made and sold by the petitioner, alleged that it had no agreement with its lessees that they should not use rivets of its competitors and that many of its lessees in fact used rivets of its competitors in other machines, denied the allegations of the complaint as to the effect of the petitioner's leases on interstate commerce, and denied that the petitioner was violating the Clayton Act. R. 25–29.

8. The case was heard at length on the testimony of many witnesses, taken before a Trial Examiner of the Commission. The following facts were shown by this testimony.

9. The petitioner is engaged in the business of making and selling tubular and bifurcated rivets. As a means of promoting the sale of such rivets, it makes and leases to its customers automatic feed rivet-setting machines for setting the rivets which it sells, and provides service to keep the machines operating properly. R.140–141, 145–146, 192.

10. Tubular rivets have the end of the shank away from the head drilled or punched out so that this end of the shank forms a tube. When the rivet is set, the metal in this tube is caused to spread or flow so as to form a clinch. Bifurcated rivets have a V-shaped slot cut in the end of the shank away from the head and are set by causing the prongs on each side of this slot to spread in opposite directions. Examiner's Report, R. 45–46; R. 191.

In this petition, and in the brief filed with it, the word "machines" refers to automatic feed rivet-setting machines, and the word "rivets" refers to tubular or bifurcated rivets, unless the context indicates otherwise.

The use of tubular and bifurcated rivets began about fifty years ago. The Tubular Rivet & Stud Company and the petitioner were the pioneers in the field and introduced the idea of using such rivets. R. 373, 631; Examiner's Report, Par. VII, R. 48–49.

11. The petitioner sells all of its rivets to manufacturers who use them for the purpose of assembling their products or as component parts in their products. Such customers for rivets are called industrial customers. Examiner's Report, R. 46–47; R. 177, 183. All industrial customers use automatic feed machines for setting rivets.

12. Each customer usually uses a considerable number of machines. The smallest number of machines used by any witness called by the Commission was four or five and the largest was more than two hundred. It is very common for such customers to use machines and rivets of two or more competitors. Examiner's Report, R. 59; R. 236, 106–8.

13. Automatic rivet-setting machines are alike in their fundamental features and there are no patents on those features. Several other companies make, lease and sell machines which will do the same work as the petitioner's machines. There are no mechanical difficulties in constructing such machines which would prevent any rivet company from supplying them for industrial use. Examiner's Report, R. 50–51, 59; R. 175–177, 233–235, 320–322, 705–706.

14. In order to meet the needs of industrial customers, it is necessary to make a great variety of rivets. R. 229–230, 152–153, 574. Great variety in rivet-setting machines and in their parts and attachments is also required, not only because different machines must be used for setting different kinds of rivets, but also because the machines must be of various shapes and sizes in order that they may set the rivets properly in the widely varied products which customers make. R. 142–143, 195–198, 572–573, 738–739, 815–819.

15. The successful use of rivets requires special engineering knowledge which is not possessed by the ordinary customer. He is not able to select the best rivet for his work, or to select a rivet which would operate properly in a particular machine, or to furnish the expert service which is necessary to keep the machines operating successfully. The engineering problems involved can usually be solved only by those who have had extensive experience in designing and servicing rivet-setting machines, as well as in making rivets. R. 256, 732–734, 745, 212–213, 575–576, 736–737.

16. The petitioner carries on business according to a plan which it has followed for more than forty years. It offers a complete riveting service to industrial concerns which can use tubular or bifurcated rivets, giving advice as to the types of machines and rivets that they need for their work, leasing machines suitable for the work, supplying expert

service to keep the machines operating properly, and selling rivets designed for satisfactory operation in its leased machines. R. 140, 183–188, 192–195.

17. The petitioner follows the practice of leasing its rivet setting machines and not selling them. R. 148–9. The petitioner's leases have always contained the provision that the leased machines shall not be used for setting any other rivets than those made and sold by the petitioner. Commission's Exhibit 1, R. 141, 1087–9.

18. The petitioner's leases do not require the lessees to make any minimum use of the machines or to purchase any specified quantity of rivets from the petitioner. R. 141, 148–149. Commission's Exhibit 1, R. 141, printed at R. 1087. The petitioner does not require that its lessees shall not use or deal in rivets of its competitors and has no understanding or agreement to that effect with its lessees. Commission's Exhibit 1, R. 141, 1087; R. 236–237; Trial Examiner's Report, R. 61. Customers of the petitioner frequently use rivets supplied by competitors in machines not leased from the petitioner. The petitioner has never objected to this practice or attempted to withdraw its machines because of it. R. 236–237.

19. The petitioner's leases may be terminated at any time by the petitioner or by the lessees on ten days notice in writing. See lease, R. 141, 1087.

20. The rentals specified in the petitioner's leases are from $15 to $25 a year for ordinary types of machines and vary according to the sizes of the machines and their attachments. R. 145–146. These rentals are rebated to the lessee if the lessee uses a quantity of rivets stated in the lease. R. 185. The petitioner makes no additional charge for engineering advice or for the services of its employees who keep the machines in condition. R. 184, 191–192. It replaces parts in the machines without charge, except disappearing point anvils, for which a charge is made because they wear out rapidly in use. R. 184, 142. As needs of a

customer may require, the petitioner supplies new attachments or changes machines without additional charge. R. 184, 193–194. A customer who uses rivets enough so that his rental is rebated pays only for rivets purchased and for disappearing point anvils and receives the use of the machines and the service which has been described.

21. The petitioner's costs for building machines and keeping them in repair and furnishing service exceed any revenue received from rentals of leased machines. The petitioner leases machines and furnishes service in order to promote the sale of rivets and regards the net expense as selling cost. R. 146–148, Commission's Exhibit 3, R. 147, 217, printed at R. 1092. For the years 1927–1939, the total net cost of the petitioner's machine and service departments was 11.7% of the rivet sales for that period as is shown by the figures appearing in Commission's Exhibit 3, R. 147, 217, printed at R. 1092.

22. Rivets can be bought on the open market for about 10% less than the price which the petitioner charges for a corresponding rivet. R. 833–834, 904, 911–912, 925, 978, 1007, 1050. The petitioner is competing for business on the basis of the cost to customers of rivets set in their work. It is able to compete on this basis, but cannot meet the rivet prices of competitors that make rivets only and do not furnish machines or service. R. 226–227.

23. Competition in the rivet business has been active for a long time and has become more active in recent years. Examiner's Report, R. 61; R. 179, 230–231, 234, 237, 369, 709–710, 729–730, 900–901.

24. An industrial user of tubular and bifurcated rivets and rivet-setting machines is free to choose whether he will secure machines and rivets under the leasing plan or whether he will buy machines and purchase rivets from competing manufacturers, and can obtain machines and rivets from several sources under either plan which will do his

work. Examiner's Report, R. 61–2; R. 568, 686, 718, 743–744, 785–786, 845–846, 860–861; 914–915, 922–923, 949–950.

Several competitors of the petitioner sell footpower machines at prices ranging from $157 to about $200 and the most popular types of power-driven machines sell for from about $200 to $500. Certain special machines are more expensive. See Examiner's Report at R. 59 and testimony as to selling prices of machines R. 275, 335; 348–349, 362; 523, 530; 715, 722; 689, 692–693.

25. Rivets are used for assembling articles which could be assembled by other means. Competition between the use of rivets and other methods of fastening is active. R. 186, 550, 564, 567–568, 920–921.

26. In order to promote the use of rivets, it is important that machines should be leased. Most customers prefer to lease machines rather than to own them for several reasons. It is often necessary for them to change machines when their products change. By leasing machines, they avoid losses from obsolescence which they would incur when they made such changes. R. 242–243, 433–434, 501–502, 640–641; 669–670; 680; 840–841; 884–885; 897–898, 905–6; 911–912; 925–927; 1029. The flexibility of the leasing system enables them to receive new machines promptly when they need them and to give them up when they are not needed, increases the efficiency of their manufacturing, and enables them to take on work which they would not otherwise undertake. R. 518–19, 821–5, 838, 883, 913–14, 962–4, 1020–21, 1042–3, 1052. In many cases the leasing system enables customers to avoid a capital investment which it would not pay them to make or which they would not be able to make. R. 444–5; 502, 510; 859; 864, 867–8; 885; 931; 937, 960–4; 996; 1021; 1029; 1041–3. Under the leasing system used by the petitioner customers have their riveting done properly and without interruption. The cost of rivets is a

small item in a manufacturer's costs and relatively unimportant as compared with losses which would result from interruptions in production or from imperfect riveting. Examiner's Report, R. 60; R. 489, 648–9, 838–40, 842–43, 863–9, 874–5, 885–6, 924–5, 954–5, 976, 988–9.

27. Leasing rivet-setting machines is not attractive as a separate business. R. 715, 726–727. The majority of the machines are not standard, but are specially designed to meet the particular problems of the customers. R. 738–739. Under the leasing system the lessor bears any losses from obsolescence of machines returned from customers for which no other use is found. At the time of the trial the petitioner had about 8,000 machines on lease and had on hand 1500 other machines that had been returned, for which there was no present use. R. 271–272.

28. There are eight rivet manufacturing companies in the United States, including the petitioner, that put out machines. Two of these, the petitioner and Tubular Rivet & Stud Company, which were the pioneers in the business (R. 373, 631), have followed the practice of leasing machines and not selling them. R. 148–9, 631–2, 1014–1016. The other six sell machines and also lease them. The sales of the petitioner and Tubular Rivet & Stud Company which appear in the testimony have been declining, while the sales of their competitors have greatly increased. During the period from 1925 to 1939 the petitioner's rivet sales declined from $1,445,676.38 to $1,243,927.86 and those of Tubular Rivet & Stud Company declined from $2,390,449.80 to $1,331,550.98. The total sales of rivets in 1939 by the companies for which figures were obtained were $5,656,298.84. The total sales of these two companies that only leased machines were $2,575,478.84. Their competitors that both sold and leased machines had sales in that year of $2,604,826. Of these sales, $2,011,326 were made by four companies which

had built up their entire industrial rivet business since the beginning of 1925. Five other companies that sell rivets but do not put out machines had rivet sales of $475,994 in 1939. The petitioner's sales were $1,243,927.86, which is 22% of the total sales. References to the testimony which showed the foregoing facts and a tabulation stating the sales of each company, will be found in the attached brief at pages 24–28.

29. Much testimony was taken as to whether it is commercially practicable to use rivets made by one manufacturer in machines of another. In order that rivets may work properly in a machine the machine and the rivets must be made with precision and the rivets must be made to the specifications for which the machine is designed. R. 191, 212, 220–6, 264–5, 288–9, 372–3, 385–6, 920.

30. There are no standard specifications for rivets. Although certain sizes of rivets are called standard because they are made from standard sizes of wire, rivets made from the same wire by different manufacturers vary in their dimensions and shapes because they are made by tools which each manufacturer produces for himself according to his own designs and these tools automatically determine the dimensions and shapes of the rivets made by them. R. 359–60, 365–8, 388–90, 706–7. Rivets made by the same manufacturer and intended to be the same will also vary from each other because the tools used in making rivets and also the gauges used in testing them wear, and consequently change. Each manufacturer has established limits of permissable variation for his rivets known as "tolerances". In order that rivets may work properly in a machine, they must not vary beyond the tolerances for which the machine was designed. There are no tolerances in the industry which are accepted as standard, but each manufacturer sets up his own. R. 217–9, 221–6. The peti-

tioner's machines are set up to use rivets which conform to its own tolerances. R. 223.

31. A good rivet manufacturer is able to make a rivet that will work in a particular machine made by another manufacturer. R. 726. In order to do so, however, he would in most cases have to change his tools and gauges, which he could not afford to do for an ordinary customer. Consequently, a rivet manufacturer ordinarily will not make an exact duplicate of a rivet of a competitor, but will supply a rivet made with his own tools and gauges as near to the competitor's as his stock will permit. R. 365–7, 870, 875–6.

32. Any failure of rivets to conform to the specifications for which the machine is designed is likely to result in interruption in the operation of the machine which can be overcome only by services of an expert. R. 377–8, 446–7, 539–40, 901.

33. The testimony showed that in practice rivets of one manufacturer frequently do not work well in machines of another. Eleven witnesses who used the petitioner's machines had attempted to use rivets of others in those machines and found that they did not work satisfactorily. R. 446–7; 832–3, 877, 881–2, 887–8; 895–6, 901; 933, 935–7; 951–5; 960–1, 965–8; 972–4, 977; 994–8; 1045; 1050–51; 1058–61.

34. It was shown by the testimony of several witnesses called by the Commission that in order to get the best riveting one company should furnish the rivets, the machines and the service, including technical advice. R. 736; 535, 538–40; 564; R. 140, 142, 154–5, 195–8.

35. There are on the market rivets that are not uniform and are not carefully inspected. Use of these rivets is likely to break or injure a machine. It was shown by the testimony of several witnesses whose companies put out machines that their machines had been broken or damaged

by use of such rivets. R. 369, 378; 341–2; 726, 757; 951–5, 933, 935–7.

36. The petitioner, in order to insure uniformity in its rivets, gauges and inspects them at various stages of manufacture with great care. More than 27% of the total labor cost incurred by the petitioner in making rivets is for cost of inspection. R. 214–216.

37. When a rivet does not operate satisfactorily in a machine, the ordinary customer is often unable to determine whether the fault is in the machine or the rivet, R. 372–3, 575–6, 704–5, 740, 257–8. The reputation of a company that puts out machines is likely to be injured if the machines do not operate properly because rivets made by others which are not adapted to the machines are used in them. R. 257–258.

38. The facts which have been stated relating to the practicability of using rivets made by one manufacturer in machines of another apply to the ordinary customer. There are some exceptional industrial users of rivets that have expert mechanical staffs who are able to prepare specifications for rivets which will work properly in any machine, and to order according to the specifications, leaving it to the rivet manufacturer merely to supply rivets conforming to these specifications. The Ford Motor Company, General Motors Corporation and the Borg-Warner Corporation are examples. These users of rivets are relatively few in number but some of them use very large quantities of rivets. Their business is important enough so that a rivet manufacturer can afford to make rivets specially to their specifications. Such customers can use rivets of various makers in machines with success. Many of them own their machines. R. 745–6; 758, 761–3, 765–70; 791, 803–4.

39. The companies that make and sell rivets but do not supply machines assume no responsibility as to whether rivets will operate successfully but confine themselves to

supplying what the customer specifies. They are not in a position to satisfy customers who need advice and assistance in solving their riveting problems. R. 478–9, 604, 611–12, 800.

40. There was no substantial conflict in the testimony as to the facts which have been stated. Many of them are contained in the report of the Trial Examiner who heard the evidence (printed at R. 44–62). All of them will be found in the Respondent's Statement of Facts Proved, printed at R. 83–138. The Trial Examiner, in the last paragraph of his report, states that he checked the references to the record in this Statement of Facts Proved and found them to be correct. R. 62.

41. The Examiner reported that the petitioner and all other companies which leased machines required that the leased machines should be used only for setting rivets of the lessors. R. 55. He also reported that the petitioner does not require the lessees of its machines not to use rivets of competitors and has no understanding or agreement to that effect with its customers, and that customers of the petitioner having its machines under lease frequently use machines and rivets supplied by competitors and the petitioner has never objected. R. 61. The Examiner also reported that witnesses familiar with the rivet business testified that competition had been active for a long time and that it had become more active in recent years. R. 61. He also reported that rivet manufacturers and purchasers and users of rivets testified that under present conditions, a user of rivets and machines is free to choose whether he will secure machines and rivets under the leasing plan or whether he will buy machines and purchase rivets from competing manufacturers and that he can obtain machines and rivets under either plan which will do his work. R. 61. These statements by the Examiner as to the facts were supported in his report by references to the

typewritten testimony. These references may be readily found in the printed record by using the numbers printed in brackets.

42. The findings of the Federal Trade Commission are contained in the record at pages 32–41. The Commission found that the petitioner's leases provided that the lessee should not use the leased machines, or allow them to be used, for setting any other rivets than those made and sold by the petitioner; and that the other companies which leased machines used similar provisions in their leases. R. 39, 35. The Commission did not find that the petitioner leased machines on the condition, agreement or understanding that the lessee should not use rivets of its competitors.

43. The findings made by the Commission on the issue as to whether the effect of the petitioner's leases may be to substantially lessen competition were as follows:

a. That there are those engaged in the sale of rivets in interstate commerce suitable for use in the petitioner's machines with whom, but for the restrictive conditions of the petitioner's leases, the petitioner would be in active substantial competition in the sale of rivets (Findings, paragraph three, R. 34).

b. That there is on the market an ample supply of rivets for use in the petitioner's machines for sale by concerns which furnish machines and by concerns which do not furnish machines; that these concerns are prepared to sell rivets to lessees of the petitioner's machines, but are precluded from making such sales by the restrictive conditions in the petitioner's leases; and that the rivets made by the petitioner can be duplicated by any competent rivet manufacturer (Findings, paragraph eight, R. 39–40).

c. That the testimony of representatives of various companies clearly indicates that the outlets of their tubular and bifurcated rivets were curtailed, and competition therein restrained, by the practice of leasing rivet setting machines

in the manner described in the findings of the Commission (Findings, paragraph nine, R. 40–41).

d. That the petitioner's practice of requiring that its lessees use no rivets other than those supplied by the petitioner in its leased machines results in the exclusion from the market of numerous parties who, in the absence of such restrictions, would be prospective purchasers of rivets from the petitioner's competitors; and that competition in the rivet market is restricted in direct proportion to the extent to which the petitioner is successful in leasing machines with the restrictive conditions. (Findings, paragraph ten, R. 41.)

e. That the effect of such restrictive conditions under the circumstances set forth in the findings of the Commission has been, is, and may be to substantially lessen competition in the sale of tubular and bifurcated rivets in interstate commerce; and that such effect is materially increased because it forms a part of the cumulative effect of corresponding practices of other companies that lease machines. (Findings, paragraph eleven, R. 41).

The Commission concluded that the petitioner was violating Section 3 of the Clayton Act, and ordered the petitioner to cease and desist from leasing its rivet setting machines on the condition that the lessees should not use in these machines any rivets other than those acquired from the petitioner or some source authorized by the petitioner and from enforcing or continuing such conditions in its leases. (R. 41–43).

44. The Commission made no findings as to the material facts shown by the testimony which have been stated in paragraphs 12 to 16, 18, 23, 24 (first sentence), 25 to 27 and 29 to 39 of this petition, which have a significant bearing on the issues in this case.

45. The petitioner brought a petition to review the order of the Commission in the Circuit Court of Appeals for the

First Circuit, in which circuit the petitioner's principal place of business was located. R. 1–18. The Commission filed a cross-petition to enforce the order. R. 1112–13. After hearing the parties, the Circuit Court of Appeals, on July 31, 1945, rendered an opinion (R. 1113–25), and entered an order dismissing the petition for review and affirming and enforcing the order of the Commission. R. 1125.

46. The petitioner contended before the Circuit Court of Appeals that the complaint and the findings of the Commission did not state that the petitioner leased its machines on the condition that the lessees should not use rivets of competitors, but merely that the leases were on the condition that the lessees should not use the leased machines for setting any other rivets than those supplied by the petitioner; that this is neither an allegation nor a finding that the petitioner requires its lessees not to use rivets of competitors; and that the uncontradicted testimony shows that there are no agreements to that effect, and that lessees frequently use rivets of competitors in machines supplied by competitors, and can obtain satisfactory machines and rivets from a number of competitors either under the leasing plan or by purchasing machines and rivets separately. Opinion of the Court, R. 1117. See petition for review, points 2, 3 and 7, R. 14.

On these points the Circuit Court of Appeals held that the condition of the petitioner's leases which precluded lessees from using rivets of competitors in the leased machines fell within the purview of Section 3 of the Clayton Act because that act applied to every lease of equipment on the condition that it shall be used only with the supplies of the lessor. The court specifically disagreed with the contention of the petitioner that such a lease, to fall within the purview of the statute, must in the light of the surrounding circumstances have the practical effect of prohibiting the use of machines or supplies of competitors and held

that the practical effect of the tying clause related to the question whether the clause substantially lessened competition. R. 1117–1120.

47. The petitioner also contended that there was no testimony sufficient to support the conclusion that the petitioner's method of leasing its machines with the condition in question had the effect of lessening competition in the trade in rivets. See points 8 and 9, R. 14–15. On this point the Circuit Court of Appeals held that the Commission properly found that the effect of the restrictive condition in the petitioner's leases "has been, is, and may be to substantially lessen competition in the sale of tubular and bifurcated rivets". R. 1119–1125.

48. The petitioner also contended before the Circuit Court of Appeals that the order of the Commission should be set aside because the Commission had failed to find numerous material facts shown by the testimony, which were specifically referred to in the petition for review, and that Section 11 of the Clayton Act required that the Commission should make findings as to such facts. See petition for review, points 10 and 11, R. 15 and the paragraphs therein referred to, R. 3–12, 14–17. These are the same facts that have been stated in paragraphs 12 to 16, 18, 23, 24 (first sentence), 25 to 27, and 29 to 39 of this petition.

The Circuit Court of Appeals did not deal with this last contention, except that it may be deemed to have done so inferentially by dismissing the petition for review.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals erred in holding that the condition of the petitioner's leases which precluded lessees from using rivets of competitors in the leased machines falls within the purview of Section 3 of the Clayton Act, and that that act applies to every lease of equipment on the condition that it shall be used only with the supplies of the lessor.

2. The Circuit Court of Appeals erred in failing to rule that the petitioner's leases are not within the purview of Section 3 of the Clayton Act, if, in the light of the surrounding circumstances, they do not have the practical effect of preventing the use of rivets of competitors by the lessees.

3. The Circuit Court of Appeals erred because it failed to hold and rule that the findings of the Commission and the testimony in the case did not show that the petitioner was leasing machines on the condition, agreement or understanding that the lessees should not use or deal in rivets of competitors.

The decision of the Circuit Court of Appeals on these three points involves the construction of Section 3 of the Clayton Act. The construction adopted by the Circuit Court of Appeals is in conflict with the decision of this Court in the case of *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463. In that case, as is shown in the attached brief, this Court held that a lease of gasoline pumps and tanks on the condition that they should be used only for gasoline supplied by the lessor, was not on the condition that the lessee should not use gasoline of a competitor, where similar equipment was readily available to the lessee for purchase or lease, because under these circumstances the leases would not obligate the lessee not to use or deal in goods of a competitor. The decision of the court below is also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Standard Oil Co.* v. *Federal Trade Commission*, 82 Fed. 81, which was affirmed by this Court in *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463, and with the other decisions of Circuit Courts of Appeals which were also affirmed in that case. The question involved in this conflict of decisions is one of great importance not only to the whole rivet industry but to many other industries in which similar leases have been made under like circumstances.

4. The Circuit Court of Appeals erred in failing to hold

and rule that the allegations of the complaint were not sufficient to support a claim that the petitioner has violated the Clayton Act and that there was therefore no foundation for the order of the Commission.

The petitioner contended that this ruling should be made. (Petition for review, point 3, R. 14). The allegations of the complaint as to the condition on which the petitioner leased its machines were merely that they were leased on the condition, agreement or understanding that the lessees would not use the machines for setting any other tubular and bifurcated rivets than those manufactured by the petitioner or sold under its authority. R. 22. It was not alleged that the machines were leased on the condition, agreement or understanding that the lessees would not use or deal in goods, wares, merchandise, machinery, supplies or other commodities of a competitor of the lessor, which is the condition referred to in the statute. The decision of the Circuit Court of Appeals in the case at bar, which affirmed the order of the Commission, is therefore in conflict with the decision of this Court in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, in which this Court held that the Commission could not properly issue an order to cease and desist on a complaint which did not state a violation of the statute involved.

5. The Circuit Court of Appeals erred in holding that the Commission properly found that the effect of the restrictive condition in the petitioner's leases "has been, is and may be to substantially lessen competition in the sale of tubular and bifurcated rivets". R. 1124–5.

On this point the decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Standard Oil Co.* v. *Federal Trade Commission*, 282 Fed. 81, and with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed.

686, both of which were affirmed in *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463. It was held in both cases that facts which are similar to those in the case at bar were not sufficient to support findings of the Commission that the effect might be to substantially lessen competition. In affirming these decisions this Court was of the same opinion. A more complete statement as to the facts of these cases and the grounds for the decisions is contained in the brief annexed to this petition.

6. The Circuit Court of Appeals erred in that it did not set aside the order of the Federal Trade Commission because the Commission failed to make findings of the material facts which the Commission was required to make by Section 11 of the Clayton Act.

Although the record shows that there was testimony as to many material basic facts and that the Commission made no finding as to those facts, the Circuit Court of Appeals affirmed the order of the Commission and dismissed the petition for review. In this respect the decision is in conflict with the decision of the Court of Appeals for the District of Columbia in *Saginaw Broadcasting Company* v. *Federal Communications Commission*, 96 F. 2d 554 (certiorari denied, 305 U.S. 613), in which an order of that Commission was set aside because the Commission failed to find the material basic facts. Since the decision in the case at bar, this Court has set aside an order of the Interstate Commerce Commission for the same reason in *North Carolina, et al.* v. *United States, et al.*, decided June 11, 1945. As is more fully stated in the brief, Section 11 requires the Commission to find the basic facts in order that it may be possible on review to determine whether these facts were supported by testimony and whether they were sufficient to support the conclusions of the Commission.

It is essential in order to protect the rights of the citizens to have an effective review by the courts of the acts of the

Commission, that the Commission be held strictly to the requirement that it shall make findings of the material facts whenever it issues an order under the Clayton Act.

7. The Circuit Court of Appeals erred in dismissing the petitioner's petition for review and affirming the order of the Federal Trade Commission, because on the record in this case the order of the Federal Trade Commission should have been set aside.

Your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 3986 *Judson L. Thomson Manufacturing Company, Petitioner* v. *Federal Trade Commission, Respondent*, and that said decree of the Circuit Court of Appeals for the First Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JUDSON L. THOMSON MANUFACTURING COMPANY
By

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